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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

HIDDEN VALLEY RANCH et al.,

Plaintiffs and Appellants,

v.

RAMONA MUNICIPAL WATER  
DISTRICT,

Defendant and Respondent.

D048026

(Super. Ct. No. BE543498)

APPEAL from a judgment of the Superior Court of San Diego County, Lillian Y.  
Lim, Judge. Affirmed.

Edward C. Malone, Barbara Malone and Hidden Valley Ranch (collectively plaintiffs) appeal from a judgment confirming an arbitration award. The trial court denied their petition to correct or vacate the arbitration award. Plaintiffs contend that,

contrary to the trial court's ruling, the arbitrator denied them a fundamentally fair hearing under Code of Civil Procedure<sup>1</sup>, section 1286.2. We affirm.

#### FACTUAL AND PROCEDURAL SUMMARY

Malone owns approximately 420 acres of land known as Hidden Valley Ranch, located in the City of Poway. Prior to the mid-1980's, Malone obtained water for their grove of fruit trees from the Green Valley Creek, which flowed through Hidden Valley Ranch. In 1984, Ramona Municipal Water District (Ramona) began construction of the Ramona Dam, which was completed in 1988.

In 1985, plaintiffs filed a complaint against Ramona for interference with riparian rights, inverse condemnation, and trespass. In 1988, the trial court, sitting without a jury, determined plaintiffs' "vested overlying water rights are prior and paramount to [Ramona's] appropriative water rights obtained by permit," and accordingly ruled, "Subject to the requirements of reasonable and beneficial use, Plaintiffs may increase their use of water . . . and such increase . . . will be under Plaintiffs' vested overlying water rights, which will remain prior and paramount to [Ramona's] appropriative water rights obtained by permit." The trial court issued a permanent injunction barring Ramona from "interfering with the overlying and riparian water rights appurtenant to the real property . . . owned by plaintiffs."

In 1995, the parties entered into an agreement intending "to settle as between them, all remaining unsettled claims." The trial court approved the settlement agreement

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<sup>1</sup> All statutory references are to the Code of Civil Procedure.

and vacated the 1988 judgment and permanent injunction. In June 1999, the trial court approved the parties' "amended and restated settlement agreement" that superseded and replaced the 1995 agreement. Ramona agreed to deliver to plaintiffs a certain amount of water free of charge, and sell to plaintiffs water in excess of that amount at a rate set out in the 1999 agreement.

In December 2002, after a dispute arose between the parties regarding rates Ramona was charging plaintiffs for water, plaintiffs filed an action in the trial court seeking enforcement of the 1999 agreement. Pursuant to the arbitration clause contained in that agreement, Ramona filed a petition to compel arbitration, which the trial court granted.

In January 2004, the arbitrator issued an interim award stating, "Malone seeks equitable relief in the form of an accounting. He is entitled to an accounting to determine what [Ramona's] charges would have been for water provided by [Ramona] to him during calendar years 1999 through 2003, inclusive, between 300 and 550 acre feet, as compared to [Ramona's] actual charges for such water during that period." The arbitrator ordered the district to provide the information required to complete the accounting.

On February, 2, 2004, the arbitrator ruled that by March 8, 2004, Ramona should provide plaintiffs the following information: "(1) for each calendar year 1999 to 2003, inclusive, the acre feet of water purchased by [Ramona], the dates that water was purchased and the price [Ramona] paid for that water; (2) for each calendar year 1999 to 2003, inclusive, and for each month within each such calendar year, the number of acre feet of water above 300 acre feet of water provided by [Ramona] to [plaintiffs]; (3) for

each calendar year 1999 to 2003, inclusive, the percentage treated water and untreated water sold by [Ramona] bears to all water sold by [Ramona] during that same year; (4) for each calendar year 1999 to 2003, inclusive, a description of what direct costs [Ramona] had which were applicable to purchasers of treated water; (5) the amount of those direct costs; and (6) whether and to what extent those direct costs were passed on by [Ramona] to the purchasers of treated water."

The arbitrator also ordered Ramona to provide plaintiffs and the arbitrator "a declaration by a knowledgeable individual . . . stating (1) whether with respect to any year(s) during the period 1999 to 2003, inclusive, [Ramona] determined that the rate it would charge [plaintiffs] for water in excess of 550 acre feet would include an ECR or a [Budgeted Electricity Rate],<sup>2</sup> and (2) if so, for which of these two rates and for which period(s) of time, and (3) how much the rate was for each period of time, and (4) how much [Ramona] actually charged [plaintiffs] for such rate(s) for each such period of time."

On March 12, 2004, Thomas Brammell testified regarding general and administrative, and overhead and maintenance costs Ramona charged water customers for untreated and treated water on a per acre foot basis. On March 15, 2004, the arbitrator acknowledged receipt of Brammell's declaration regarding Ramona's charges for untreated water. The arbitrator ordered Ramona to provide by April 16, 2004, additional information to support the accounting, and specified the formula he would use

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<sup>2</sup> We cannot tell from the record what ECR stands for.

to determine if Ramona had overcharged or undercharged plaintiffs. The arbitrator wrote, "If any disputes between the parties arise prior to the April 27th hearing, the parties are directed to attempt to resolve those disputes informally." Ramona timely provided the information.

On May 6, 2004, the arbitrator informed the parties that Ramona's calculations were made on the basis of the fiscal year instead of the calendar year, and requested Ramona either provide the information based on the calendar year or explain its inability to do so. On May 28, 2004, Ramona responded regarding the information sought.

On May 27, 2004, plaintiffs wrote to Ramona, "Thank you for your expedited delivery of the audited financial statements for [Ramona] for the years 1995 through 1998, inclusive. As you know, [Ramona] produced several documents in connection with its calculation of the purported [general and administrative], overhead and maintenance for the years 1999 through 2003. We request the same form of documents for the years 1995 through 1998, inclusive."

On June 4, 2004, the arbitrator expressed a "strong inclination" to accept Ramona's calculations submitted on May 28, 2004. The arbitrator presented the formula he intended to use in the accounting, and presented charts indicating that from 1999 to 2002, Ramona should have charged plaintiffs \$72,733.07 for untreated water in the range of 300 and 550 acre feet. The arbitrator informed the parties, "During our telephonic conference, we will also discuss when calendar year 2003 figures will be available, so that my determination of which party owes which party money can be finalized. Based on information currently available to [Ramona], the parties may wish to explore the

possibility of stipulating to what appears to be the only remaining figure needed, namely applicable '[general administrative] / Overhead' for calendar year 2003."

On June 25, 2004, Plaintiffs filed a request for production of documents seeking from Ramona 73 requests relating to Ramona's budget and expenses between 1992 and 2005. Ramona responded on July 14, 2004. On July 30, 2004, the arbitrator set September 9, 2004 for the next telephonic status conference, and wrote the parties, "Prior to that conference, counsel for the parties will meet to discuss the financial documents [Ramona] has provided to [plaintiffs'] counsel, to see if the parties can come to a mutual understanding of [general and administrative], overhead and maintenance costs as they relate to the issues in this arbitration."

On September 9, 2004, the arbitrator informed the parties by letter that plaintiffs' counsel had not completed a review of Ramona's submitted documents, but would do so prior to the next scheduled status conference on October 6, 2004, and meet with opposing counsel to determine "whether or not [plaintiff's counsel] believes [Ramona] has calculated those costs correctly, and if he believes [Ramona] has not, in what respects he believes [it] has not."

On October 29, 2004, the arbitrator informed the parties that based on information Ramona provided, he would find plaintiffs owed Ramona "\$90,544.07 for untreated water in the range of 300-550 acre feet of water" from 1999 to 2003, inclusive. The arbitrator announced his intention to declare Ramona the prevailing party at the November 2, 2004 telephonic hearing.

On November 1, 2004, plaintiffs informed the arbitrator and Ramona they still lacked certain information regarding Ramona's calculations, and requested that the arbitrator reserve final judgment until he could hold a hearing for plaintiffs to object to the accounting. Ramona opposed this request on November 3, 2004. The arbitrator responded to the parties on November 5, 2004, and reaffirmed his October 29, 2004 ruling. On November 8, 2004, plaintiffs renewed their objections to the arbitrator's October 29, 2004 ruling.

On November 24, 2004, the arbitrator issued a "second interim award." On February 28, 2005, Plaintiffs filed in the arbitral forum an application to correct the final award under sections 1284 and 1286.6. On March 29, 2005, the arbitrator denied the application, and ruled, "There was no evident miscalculation of the figures in the Final Award. I determined the proper method of calculating general administrative, overhead and maintenance charges chargeable by Ramona to Malone under the 1999 Agreement. I ordered Ramona to provide certain specified information concerning general administrative, overhead and maintenance expenses incurred by Ramona, and Ramona provided me and Malone with that information. No credible evidence has been adduced that that information is incorrect.

"Malone made numerous requests over a nine-month period for different types of information and documentation concerning general administrative, overhead and maintenance expenses incurred by Ramona. I ordered Ramona to produce that information and documentation, and Ramona provided it to Malone and to me. I then applied the financial information . . . to the formula I determined was the proper formula

for calculating how much Malone should have paid Ramona. . . . By the time I entered my Interim Award on January 29, 2004, Malone was not contesting the accuracy of that information. [¶] . . . At no time has Malone ever contended there was an error in my calculations. . . . To this date, Malone makes no such contention."

The arbitrator also denied that he exceeded his powers in ruling on the accounting, and stated, "It was Malone who requested an accounting be performed. Necessarily implicit in that request was a request that the results of that accounting be applied, that is, that I determine whether there were any overcharges or undercharges for untreated water, and order a refund to Malone, or an additional payment by Malone, based on the results of that accounting. Moreover, counsel for the parties specifically discussed, during the arbitration, the fact that, if the accounting reflected an overpayment by Malone, Ramona would refund money to him, but if it reflected an underpayment by Malone, Malone would make an additional payment to Ramona. Counsel for Malone did not object or voice any different understanding of what the accounting would achieve."

Finally, the arbitrator denied the request to correct the award under section 1286.6. The arbitrator reasoned that the finding Plaintiffs had underpaid Ramona went to the merits of the controversy, and therefore he was barred from correcting the award.

The arbitrator issued a "revised final award" in April, 2005, that stated as follows: "From January 29, 2004, until approximately November 8, 2004, [Ramona] rendered the ordered accounting. It did so by providing to counsel for Malone on multiple occasions documents requested by Malone and making [Ramona] personnel available to counsel for Malone on multiple occasions to answer questions concerning those documents. During



this period, the arbitrator and counsel for the parties engaged in several telephonic conference calls to discuss the accounting, and in the course of these conferences, the arbitrator ordered [Ramona] to provide documents and information to counsel for Malone, and [Ramona] did so. [¶] . . . Based on the accounting, Malone has underpaid [Ramona] \$90,544.07 for untreated water provided to him in the range of 300-550 acre feet during calendar years 1999-2003 inclusive." The arbitrator ruled Ramona was the prevailing party, and therefore entitled to reasonable costs, expenses and attorneys' fees.

In July, 2005, plaintiffs filed in the trial court a petition to correct or vacate the revised final award of arbitration under the grounds stated in section 1286.6, subdivisions (a)-(c), alleging "there was an evident miscalculation" of the accounting and other monetary awards. Plaintiffs also claimed they were denied a fundamentally fair hearing because Ramona's accounting was provided "without testimony under oath and [without being subject] to cross-examination." Ramona filed a cross-petition to confirm the award. The trial court denied plaintiffs' petition and granted Ramona's petition, noting the accounting took a long time, during which the parties shared documents and communicated multiple times regarding the information received.

The court ruled, "[N]o objection was made to the informality of the process or a timely request that in lieu of this process an evidentiary hearing be held. Plaintiff suggests he was misled into thinking that this fact-finding mission on which the arbitrator had embarked was a prelude to an actual evidentiary hearing. . . . However, there was nothing that the arbitrator affirmatively did that would lead to that misunderstanding nor was the arbitrator on timely notice that any more formal process had been requested. For

that same reason, this court finds to the extent a party is entitled to sworn testimony and an adversarial evidentiary hearing in the arbitration setting, that right was waived under the circumstances of this case."

## DISCUSSION

Plaintiffs contend the trial court did not comply with the requirement to "vacate the award if the court determines that . . . [t]he rights of the party were substantially prejudiced . . . by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title." (§ 1286.2, subd. (a)(5).) Plaintiffs specifically allege the arbitrator denied them a fundamentally fair hearing because, with respect to the accounting, he did not "permit an evidentiary hearing regarding the accounting of [Ramona's] charges and expenses under the 1999 Agreement. . . . Indeed, no evidence was presented regarding the accounting issues. . . . Instead, the arbitrator allowed [Ramona] to produce documents and respond to inquiries without any oath being taken and without requiring matters to be submitted under penalty of perjury. . . . Spreadsheets, responses to document requests and answers to written questions were offered by [Ramona's] counsel without any oath, testimony or authentication." We reject this contention.

"[I]t is the general rule that, with narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law" by either the trial or appellate courts. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11; 13.) These exceptions "are set forth in sections 1286.2 (to vacate) and 1286.6 (for correction). Further, the existence of an error or law

apparent on the face of the award that causes substantial injustice does not provide grounds for judicial review." (*Id.*, at p. 33.)

Section 1286.2 subdivision (a)(5) has been interpreted as follows, "the arbitrator's obligation 'to hear evidence' does not mean that the evidence must be orally presented or that live testimony is required. . . . An arbitrator 'hears' evidence by providing a 'legal hearing,' that is, by affording an 'opportunity to . . . present one's side of the case. [Citation.] An arbitrator also 'hears' a matter by 'consider[ing] a motion upon presentation thereof by counsel.' [Citation.] Thus, a 'hearing' does not necessarily include an obligation to present live testimony or be subject to cross-examination." (*Schlessinger v. Rosenfeld, Meyer, & Susman* (1995) 40 Cal.App.4th 1096, 1105) (*Schlessinger*).

"We decline to read section 1286.2, subdivision [(a)(5)], as requiring that an arbitrator always resolve disputes through the oral presentation of evidence or the taking of live testimony. . . . The purpose of arbitration, as reflected in the Act, is to provide a 'speedy and relatively inexpensive means of dispute resolution.' " (*Schlesinger, supra*, at p. 1105.) "We do not accept the suggestion . . . that section 1286.2, subdivision [(a)(5)], provides a back door to *Moncharsh* . . . [i]nstead, we interpret [this section] as a safety valve in private arbitration that permits a court to intercede when an arbitrator has prevented a party from fairly presenting its case." (*Schlesinger, supra*, at pp. 1110-1111.)

Here, the proceedings the arbitrator conducted in establishing the basis for the accounting constituted hearings within the meaning of section 1286.2, subdivision (a)(5). The arbitrator did not deprive plaintiffs of a fundamentally fair hearing because plaintiffs

had sufficient opportunity to present their case to the arbitrator. Plaintiffs sought the accounting from Ramona and, over a nine-month period, requested and received numerous documents from Ramona, and met with its counsel on different occasions regarding the accounting, and at least once met with Ramona's knowledgeable officer, Brammell. There is no evidence that plaintiffs timely objected to the accuracy of the information Ramona submitted, and on which the arbitrator relied. Although plaintiffs claim in their opening brief they "repeatedly requested an evidentiary hearing so these documents could be authenticated and [Ramona's] answers to questions could be provided under oath and subject to a thorough cross-examination," they provide citations to only two complaints they made on November 1 and 8, 2004, days after the arbitrator's interim award was issued. On this record, the trial court correctly found plaintiffs waived their right to an oral hearing by not timely requesting one.

#### DISPOSITION

The judgment is affirmed. The Ramona Municipal Water District is awarded costs on appeal.

O'ROURKE, J.

WE CONCUR:

McDONALD, Acting P. J.

AARON, J.